

IN THE MATTER OF ARBITRATION	]	MINNESOTA BUREAU OF MEDIATION SERVICES
	]	
BETWEEN	]	CASE NO: 15-PA-0039
	]	
ANOKA COUNTY SHERIFF'S OFFICE	]	
	]	
(EMPLOYER)	]	DECISION OF THE ARBITRATOR
	]	
and	]	
	]	
LAW ENFORCEMENT LABOR SERVICES, INC.	]	
	]	
LOCAL NO: 222	]	
	]	
(UNION)	]	

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ARBITRATOR: Eugene C. Jensen

DATES AND LOCATION OF HEARING: February 25 & 26, 2015  
Anoka County Sheriff's Office  
Andover, Minnesota

FINAL SUBMISSIONS: March 18, 2015

DATE OF AWARD: April 8, 2015

ADVOCATES: For the Employer

Marcy S. Crain  
Assistant County Attorney  
Anoka County Government Center  
2100 Third Avenue  
Anoka, Minnesota 55303-2265

For the Union

Isaac Kaufman  
General Counsel  
Law Enforcement Labor Services, Inc.  
327 York Avenue  
Saint Paul, Minnesota 55103

GRIEVANT: Corey Ekum

WITNESSES

For the Employer

Paul Sommer  
Administration Division Commander  
Anoka County Sheriff's Office

Kevin Halweg  
Patrol Division Commander  
Anoka County Sheriff's Office

Paul Young  
Anoka County Prosecutor  
Division Chief for Violent Crimes

Chad Worden  
Chief Deputy  
Chisago County Sheriff's Office

Tom Wells  
Chief Deputy  
Anoka County Sheriff's Office

For the Union

Jennifer Coolidge  
Coolidge Counseling Services

Corey Ekum  
Grievant

ISSUE

Did the Employer have just cause to terminate the Grievant when it did so on June 4, 2014?

And, if not, what shall the remedy be?

JURISDICTION

In accordance with the Minnesota Public Employment Labor Relations Act (PELRA), the Minnesota Bureau of Medication Services (BMS), and the January 1, 2014, through December 31, 2015, Collective Bargaining Agreement between the parties, this matter is properly before the Arbitrator.

PERTINENT CONTRACT LANGUAGE

## ARTICLE 7, GRIEVANCE PROCEDURE

SECTION 7.1

A grievance shall be defined as a dispute or disagreement raised by an employee against the employer involving the violation or application of the specific provisions of this agreement. . . .

SECTION 7.3

GRIEVANCE PROCEDURE: Grievances, as herein defined, shall be processed in the following manner:

Step 3. ARBITRATION – If the Grievance is not settled in accordance with the foregoing procedure, the employee and union may refer the grievance to arbitration within seven (7) working days after the employee and union's receipt of the employer's written answer in Step 2. The selection of the arbitrator shall be made in accordance with the "Rules Governing the Arbitration of Grievances" as established by the Bureau of Mediation Services. The arbitrator shall hear the grievance at a scheduled meeting subject to the availability of the employer and the union representatives. The arbitrator shall notify the employee, the union representative and the employer of the decision within thirty (30) calendar days following close of the hearing or submission of briefs by the parties, whichever is later, unless the parties agree to an extension thereof.

ARTICLE 14, DISCIPLINE

- (1) The employer will discipline employees for just cause only. Just cause will be reduced to writing when applied pursuant to this Article. Discipline will be in any one of the following forms:

- a) Discharge
- b) Demotion
- c) Suspension
- d) Written reprimand
- e) Oral reprimand

(2) Suspensions, demotions and discharges will be in written form. . . .

(5) Discharges will be preceded by a five (5) day suspension, without pay.

(6) A union representative shall have the right to be present at any questioning of an employee concerning investigation for disciplinary action against that employee. The union representative's role at such questioning shall be governed by the rules governing an attorney representing an accused in a Grand Jury proceeding.

#### GENERAL BACKGROUND

The Employer in this matter is the Anoka County Sheriff's Office which is located in the State of Minnesota. The Grievant, at the time of his termination, had worked as a patrol deputy for the Employer for approximately six years (since 2008). He previously worked for the Employer as a

detention deputy for a short period of time. And, prior to that, he held various positions in other law enforcement jurisdictions for more than ten years.

In 2009 the Employer hired a female patrol deputy (hereinafter referred to as A.P.) The Grievant and A.P. began a romantic relationship, and in November of 2010, the Grievant moved into A.P.'s home in Stacy, Minnesota.<sup>1</sup> In March of 2012, A.P. resigned her position with the Employer and went to work for the Minnesota Department of Natural Resources as a conservation officer. The Grievant and A.P. eventually made plans to get married, and the wedding date was set for December 9, 2013. Approximately one month before the chosen date, A.P. decided to cancel the wedding and on November 1, 2013, the Grievant moved out of her home.

The Grievant's behavior toward A.P. following their "break-up" resulted in a 2/26/2014, Harassment Restraining Order (HRO), an internal affairs investigation by the Employer, a criminal investigation by Chisago County, a 5/13/2014, criminal complaint for stalking, with a judges determination that there was probable cause to support the charge, and the Grievant's termination on 6/4/2014.

The termination is the subject matter of this arbitration award.

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<sup>1</sup> Located in Chisago County

### THE EMPLOYER'S ARGUMENTS

The Employer argues that the Grievant's persistent actions to contact A.P., despite her clear message to him that the relationship was over, and his subsequent arrest, strike at the very heart of the Anoka County Sheriff's Office's mission statement: "To protect and serve the community in a manner that preserves the public trust."<sup>2</sup>

ARBITRATOR'S NOTE: *The following statements are excerpts taken from the Employer's post-hearing brief:*

#### The Stalking Behavior

- The day after calling off the relationship . . . she received hundreds of text messages from [the Grievant].
- On October 6, 2013, [A.P.] called the Chisago County Sheriff's Office for assistance in retrieving some of her belongings from her home.

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<sup>2</sup> Employer's Post-Hearing Brief (EPHB), p. 1

- On November 1, 2013, [A.P.] . . . found red rose petals covering the inside of her house.<sup>3</sup>
- One night he convinced her to come to his home; he was really struggling. [The Grievant] alternated between sobbing and being aggressively confrontational. She told him she didn't know how to help him. . . . [H]e told her he didn't want to live anymore and had no purpose in life.<sup>4</sup>
- For protection, [A.P.] bought a shotgun and kept it loaded by her bedside.
- On February 24, 2014, he showed up at her door, bearing jewelry he wanted to return to her, despite being told to stay away from her.<sup>5</sup>
- At least 19 times, [A.P.] told [the Grievant] to stop it and to leave her alone.

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<sup>3</sup> EPHB, p. 3

<sup>4</sup> P. 4

<sup>5</sup> P. 5

One message [2/22/2014] in particular disturbed A.P.:<sup>6</sup>

Well tell u what, [I]ll come over and u can just blast me and call [C]hisago [C]ounty  
n say I broke in. That way u get the money, I'm gone from u for good and then u  
will look like a big hero to ur mother[.]<sup>7</sup>

### Harassment Restraining Order

- Two days after receiving the text threatening to come to [A.P.'s] so she could shoot him, she filed for a Harassment Restraining Order<sup>8</sup> (HRO) in Chisago County District Court. [The Grievant] did not contest it.
- He violated the HRO on March 27, 2014, by sending [A.P.] a text . . . .
- He was arrested on that offense and spent two nights in Jail.<sup>9</sup>

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<sup>6</sup> P. 7

<sup>7</sup> P. 8

<sup>8</sup> Joint Exhibit 2, Subsection I, pp. 133-35

<sup>9</sup> Pp. 8-9

### Criminal Stalking Charges

- While the Employer was conducting its internal affairs investigation, the Chisago County Sheriff's Office was conducting a criminal investigation. . . The Chisago County Attorney's Office filed a criminal complaint charging [the Grievant] with stalking. . . And a district court judge reviewed the complaint and signed it.
- While many relationships fail and some engagements are called off, very few result in criminal behavior or criminal charges. . . This is one of the few situations where a peace officer's conduct was so disturbing and contrary to law that a prosecution for a crime of violence resulted.<sup>10</sup>

### The Plea Agreement and Sentencing

- Pursuant to a plea agreement that was memorialized in the Rule 15 guilty plea petition, [the Grievant] agreed to plead guilty to stalking. In exchange, the State agreed to dismiss the HRO violation. The parties also agreed to a stay of adjudication for sentencing, a stayed jail sentence of 365 days, a mental health evaluation, a domestic violence inventory, two years' probation and no DANCO (domestic abuse no contact order).

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<sup>10</sup> Pp. 10-11

- If [the Grievant] successfully completes probation and all of its terms and conditions, he will be discharged from probation on October 1, 2016. He is currently on supervised probation and has a criminal record.<sup>11</sup>

### Expungement

[The Grievant] explained that he will seek to have these charges expunged. . . .

[The Grievant] would not be eligible to bring a petition for expungement until October 1, 2017. And because stalking is considered a “crime of violence,” which can be used for sentencing enhancement due to its serious nature, the prosecutor could . . . file an objection to the expungement petition.<sup>12</sup>

### Damaged Ability to Testify in Court

In criminal cases, prosecutors are required to disclose the criminal records of its witnesses to the defense attorney. Because the prosecutor is aware of [the Grievant’s] conduct and criminal record, the prosecutor is ethically obligated to disclose it to the defense. . . . If [the Grievant] was needed as a witness in a contested hearing or a trial, the prosecutor’s ability to manage and prosecute the case would be severely compromised.<sup>13</sup>

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<sup>11</sup> P. 12

<sup>12</sup> P. 15

<sup>13</sup> Pp. 19-20

Violations of Department Policy

[The Grievant's] pattern of behavior harassing and stalking [A.P.] was unethical, incompatible with his employment, violated multiple sections of the policy manual, and violated state law. Additionally, his behavior was unbecoming a member of the Office, was disgraceful or tended to reflect unfavorably upon the Office or its members.<sup>14</sup>

For all of the above-stated arguments and more, the Employer asks the Arbitrator to reject the Union's Grievance and uphold the Grievant's termination.

THE UNION'S ARGUMENTS

ARBITRATOR'S NOTE: *The following statements are excerpts taken from the Union's post-hearing brief:*

- I. **Many of the allegations raised against [the Grievant] are false and cannot be sufficiently proven by the County. . . .**

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<sup>14</sup> p. 22

It is clear that in deciding to terminate [the Grievant], the County has accepted at face value [A.P.'s] assertion that she "never wavered" from her decision to end the relationship, and that [the Grievant] harassed her non-stop for more than four months. Yet the evidence presented at the hearing demonstrates that these allegations are false or, at the very least, grossly exaggerated. Specifically, [A.P.] has admitted that during the months following the breakup . . . she in fact had regular, voluntary contact with [the Grievant], including repeatedly visiting his house and using the key that he had given her. . . .<sup>15</sup>

To resolve these discrepancies, the Arbitrator must make a determination of the relative credibility of [the Grievant] and [A.P.]. In this regard, it is critical to note that unlike [the Grievant], [A.P.] did not testify at the arbitration hearing – as such, the County relied entirely on hearsay statements from [A.P.'s] preliminary meeting with Lt. Lensmeier and her interview with Commander Sommer. Unlike [the Grievant] [A.P.] was never under oath and was never subject to cross-examination. . . .<sup>16</sup>

[T]he Arbitrator should consider [the Grievant's] testimony to be more credible, and should resolve these discrepancies in his favor. . . Although [A.P.] asserts that she never wavered from her decision to break up with [the Grievant] and had to

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<sup>15</sup> Union's Post-Hearing Brief (UPHB), p. 16

<sup>16</sup> UPHB, p. 17

fend off his ongoing attempts to reconcile the relationship, the weight of the evidence paints a very different picture: that of a messy breakup that took place in fits and starts over a period of several months, and which was emotionally fraught for both parties. . . .<sup>17</sup>

As for [the Grievant's] alleged violation of the *ex parte* HRO, the only fact that the county can establish – and which the Union does not dispute – is that [A.P.] received the “U can’t push me away” text on March 27, 2014. [The Grievant] has consistently maintained that this text was originally composed and sent back in December 2013, and was resent accidentally on March 27 after his cell phone had locked up and had to be restarted. . . .<sup>18</sup>

Finally, the Arbitrator should note the significance of DNR Capt. Greg Salo’s role in this proceeding. . . [A]bsent Capt. Salo’s phone call, it is not at all clear that [A.P.] ever would have made a complaint to the County in the first place. The fact that the County proceeded with its investigation, apparently unaware of evidence of Capt. Salo’s romantic (or at least sexual) interest in [A.P.], further undermines the County’s case.<sup>19</sup>

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<sup>17</sup> P. 19

<sup>18</sup> P. 21

<sup>19</sup> P. 22

**II. The charges that were properly sustained against [the Grievant] are not sufficient to justify terminating him.**

When [A.P.'s] false allegations are discounted and the evidence surrounding her breakup with [the Grievant] is viewed clearly and impartially, what is left of the County's case are these facts: (1) For a period of six days between February 18 and 24, 2014, after [A.P.] had texted [the Grievant] that she wanted him to stop contacting her, he continued sending her text messages and left a gift package at her house. (2) Some of [the Grievant's] texts during this period were admittedly troubling and raised concerns about his fitness for duty. (3) [The Grievant] pled guilty to gross misdemeanor stalking, with a two year stay of adjudication. The Union submits that these facts do not amount to just cause to terminate [the Grievant] and end his career in law enforcement.

In assessing the severity of the discipline, the Arbitrator should consider that [the Grievant] is a 20-year veteran of law enforcement, and that prior to [A.P.'s] complaint, he had served Anoka County for seven years without discipline. . . .<sup>20</sup>

[T]he record includes testimony from Jennifer Coolidge, the clinical counselor who performed [the Grievant's] pre-sentencing diagnostic assessment and who has been conducting weekly counseling sessions with [the Grievant] since January

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<sup>20</sup> P. 22-3

2015. . . . In her written report and testimony, Ms. Coolidge characterized [the Grievant's] texts as "pathetic" and "self-pitying," but not threatening actual violence. . . .<sup>21</sup>

Ms. Coolidge opines that [the Grievant's] conduct toward [A.P.] was "situational and an example of an error in judgment versus an ongoing risk." . . . The contention that [the Grievant] should not be reinstated because he is a dangerous person is untrue and not supported by the record. . . .

To justify terminating [the Grievant], the County relies heavily on his decision to enter a guilty plea on the gross misdemeanor stalking charge (which it should be noted, took place after the County had fired him). While a guilty plea in a criminal proceeding is of course a serious matter, there are numerous mitigating factors here. First, the only facts that [the Grievant] was required to testify to at his plea hearing were that beginning on January 29, 2014, he had sent [A.P.] numerous text messages, including after she had indicated that she did not want to have further contact with him; although the district court judge accepted this as sufficient to meet the elements of a stalking charge, it was not stalking in the traditional sense of following, watching or bothering someone in a way that is frightening or dangerous. Second, [the Grievant's] plea agreement includes a two-year stay of adjudication, which means that no conviction has been entered into

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<sup>21</sup> P. 25

his record, and that the gross misdemeanor charge will be dismissed altogether in October 2016. Third, [the Grievant] will be eligible to petition the court to have all records of the criminal proceeding, including the arrest expunged from his record. . . .<sup>22</sup>

The County also contends that if [the Grievant] is reinstated, in the event he is called to testify in future criminal cases, the prosecutor may have to disclose his guilty plea to the defense as exculpatory evidence under the *Brady/Giglio* doctrine. . . . The Union respectfully disagrees with the County's application of *Brady/Giglio* in this case. Despite Assistant County Attorney Paul Young's testimony regarding his office's practices, the Union is unaware of any published cases or other authority extending *Brady/Giglio* to a situation like this, where an employee has agreed to a stay of adjudication and has no conviction in his record.<sup>23</sup>

For all of the above-stated arguments and more, the Union asks the Arbitrator to reinstate the Grievant and/or reduce the level of discipline.

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<sup>22</sup> Pp. 26-7

<sup>23</sup> P. 27

DISCUSSION

Commander Halweg's May 27, 2014, Notice of Suspension with Intent to Discharge letter to the Grievant provides the specific reasons for the employer's decision to terminate:<sup>24</sup>

You are being discharged for off-duty conduct resulting in charges of Stalking (Gross Misdemeanor). Your actions discredited yourself and the office. Your conduct and the resulting criminal complaint are inconsistent with your position of Deputy Sheriff. We cannot continue to employ you.

Your conduct violates the following Sheriff's Office policies: General Order 340.2 Conduct; General Order 340.2[.1] Lawful Orders; General Order 340.3(a) failure to abide by the standards of ethical conduct, (b) activity that is incompatible with an employee's condition of employment, (c) violations of any rule, order, requirement or the failure to follow instructions contained in Office or County manuals, . . . (l) violations of federal, state, local or administrative laws that are willful or inexcusable or involve moral turpitude, . . . (n) any on or off-duty conduct that any employee knows or reasonably should know is unbecoming a member of the Office; General Order 340.3.5 PERFORMANCE (n) violating a law related to employment or any misdemeanor or felony statute; and General Order 702.6 USE OF PERSONAL COMMUNICATION DEVICES (b) may not conduct personal business

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<sup>24</sup> Joint Exhibit 3

while on-duty, (d) prohibited from taking pictures... unless directly related to official office business.

A more detailed analysis of these alleged policy violations reveals more about the Employer's reasoning at the point of discharge.

[Office Policy 340.2 specifically refers to actions] that may materially affect or arise from the employee's ability to perform official duties, that it may be indicative of unfitness for his/her position or that brings discredit or harm to the professional image or reputation of the Office, its members, the County or the law enforcement profession.<sup>25</sup>

There is little doubt that the Grievant's actions, if known to the county prosecutor's office, defense attorneys, other law enforcement agencies or the public, would bring discredit to Sheriff's office and likely harm its continuing enterprise. In addition, how could those same actions not erode the essential trust between a sheriff's office and one of its own sworn peace officers?

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<sup>25</sup> Union Exhibit 3, P. 1 (Anoka County Sheriff's Office Policy Manual)

Office Policy 340.2.1 Lawful Orders – Employees shall comply with lawful directives and orders from any supervisor or person in position of authority absent a reasonable and bona fide excuse.<sup>26</sup>

The Grievant was fully aware of his responsibility to discontinue his pursuit of A.P. once she had made it clear to him that she no longer wanted to see him or have him contact her. This message was made clear to him by the actions of A.P. and the Chisago County's Sheriff's Office to protect her. Despite his awareness he continued to contact her, resulting in a restraining order from the Tenth Judicial District Court and ultimately his arrest and charge for gross misdemeanor stalking. The Grievant was unwilling to accept the word no until he was finally charged in court. Although the Grievant argues that A.P. wavered in her resolve to end the relationship, it is more likely that his manipulations through threats to harm himself, caused A.P. to be more concerned about the continuation of his life, rather than a continuation of their relationship.

Office Policy 340.3 Conduct That May Result in Discipline. . . . Employees shall conduct themselves, whether on- or off-duty, in accordance with . . . all applicable laws, ordinances and rules enacted or established pursuant to legal authority.<sup>27</sup>

Specifically, Halweg identifies sections (l) and (n) in his letter to the Grievant:

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<sup>26</sup> Union Exhibit 3, p. 1 (from the same manual mentioned above)

<sup>27</sup> Union Exhibit 3, p. 2

[l] Violations of federal, state, local or administrative laws that are willful or inexcusable or involve moral turpitude, including violations of Minn. R. Ch. 6700.1600 [Violations of Standards of Conduct].

[n] Any on- or off-duty conduct that any employee knows or reasonably should know is unbecoming a member of the Office or that is contrary to good order, efficiency or morale, disgraceful or that tends to reflect unfavorably upon the Office or its members.<sup>28</sup>

Here again, the Grievant's continued attempts to resurrect his relationship with A.P. were in clear violation of the language and intent of the policies. His actions were both willful and inexcusable. Willful to such a degree that repeated attempts to modify his behaviors failed, and inexcusable because, as a sworn peace officer, he was fully aware that his actions were egregious and likely to bring about a legal response. The seventh edition of Black's Law Dictionary defines moral turpitude as: "conduct that is contrary to justice, honesty, or morality."<sup>29</sup> The Grievant's conduct was in direct violation of a court order; and yet, more importantly, it represented a lengthy violation of A.P.'s sense of security, even in her own home. Despite repeated requests to discontinue his unwanted overtures, he continued to harass her. As to dishonesty or morality the Grievant's actions speak for themselves.

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<sup>28</sup> Union Exhibit 3, p. 2

<sup>29</sup> Copyright 2000, Bryan A. Garner, Editor in Chief, p. 821

And finally, Halweg cites Office Policy 702.6, Use of Personal Communication Devices [PCD's], Subsections (b) and (d):

(b) A PCD may not be used to conduct personal business while on-duty except for brief personal communications.

(d) Deputies are prohibited from taking pictures, video or making audio recordings or making copies of any such picture or recording media unless it is directly related to official office business.<sup>30</sup>

Although these were not the primary reasons for the Grievant's discharge, they are valid concerns. The frequency of text messages to A.P. during working hours convinces the Arbitrator that the Grievant went way beyond any reasonable standard of usage. In addition, it would be logical to assume that time spent texting took away from the Employer's work.

Has the Grievant learned from his mistakes, and if so, is he a legitimate candidate for another chance? It was apparent at the hearing that the Grievant had gained some insights into his behaviors. He and his ongoing counselor both felt that he was unlikely to violate probation, repeat as a stalker, or necessitate legal restraint. Everyone involved in this matter should feel good about his resolve. And yet, at the hearing, he continued to minimize his behaviors and to shift the responsibility for his actions back onto the victim. He testified that A.P. had given him

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<sup>30</sup> Union Exhibit 3, pp. 8-9

mixed responses when he attempted to continue the romance. Two approaches worked better than others to get A.P. to respond to him: the health, safety and care of the dogs, and his various suicidal threats. He tried several other methods to gain her attention: glorification, financial security, gifts, and threats; however, her concerns for the dogs and her fears that he might hurt or kill himself were the most effective. A.P.'s resolve to end the relationship was clear and long-standing; unfortunately the Grievant chose to view any response from her as a potential willingness on her part to revive the relationship.

As to a second chance, although I am optimistic that the Grievant would not let this occur again in the future, the actions that led up to the charge of gross misdemeanor stalking -- those actions that were validated by two independent investigations -- are such that the Arbitrator would be remiss if he put the Grievant back to work, either now or following a protracted suspension. His return to work would further violate the Employer's mission statement: to operate in a "manner that preserves the public trust." The Anoka County Sheriff's office did what was necessary to preserve that public trust: it terminated the Grievant's employment. For the sake of the Sheriff's Office's reputation alone, the Employer needed to set distance between itself and the Grievant's actions. While it is a shame to lose a fully trained and long-serving deputy, the Arbitrator agrees with the Employer's decision.

AWARD

After a thorough and careful analysis of the witnesses' testimonies, the exhibits and the advocate's arguments, the Arbitrator finds that the Employer was justified in terminating the Grievant's employment. The Grievance is denied.

The Arbitrator shall retain jurisdiction over this matter for sixty (60) days following the date indicated below.

Respectfully submitted this 8th day of April, 2015.

A handwritten signature in black ink, appearing to read "E. C. Jensen", is written over a light gray rectangular background.

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Eugene C. Jensen  
Neutral Arbitrator